

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUTHIE M. HALL

Claimant

VS.

DILLON COMPANIES, INC.

Self-Insured Respondent

Docket No. **1,016,251**

ORDER

Claimant requested review of the June 1, 2007 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on September 12, 2007.

APPEARANCES

Bruce A. Brumley of Topeka, Kansas, appeared for the claimant. Scott J. Mann of Hutchinson, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant suffered bilateral carpal tunnel syndrome as a result of her repetitive work activities for respondent. The parties were unable to agree on the nature and extent of claimant's disability and that issue was litigated. The claimant alleged she was entitled to compensation for a whole person injury and work disability (a permanent partial general disability greater than the functional impairment rating) as a result of her accidental injuries. The respondent agreed claimant suffered injury to both upper extremities but denied claimant was entitled to compensation for a work disability.

The Administrative Law Judge (ALJ) determined that the *Casco*¹ decision was applicable and awarded claimant compensation based upon a 10 percent impairment to

¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

each upper extremity at the forearm for two separate scheduled disabilities pursuant to K.S.A. 44-510d.

Claimant argues that *Casco* does not apply because claimant injured her wrists and wrists are not listed in K.S.A. 44-510d. Consequently, claimant further argues she suffered a whole person injury and is entitled to a 43.42 percent work disability. In the alternative, if the Board finds *Casco* applicable and limits her compensation to two separate scheduled disabilities, claimant argues that the percentage of disability to her right forearm should be increased to 15 percent. Finally, the claimant, in her brief, argues K.S.A. 44-510d is unconstitutional as the statute violates both the Equal Protection and Due Process clauses of the State and Federal Constitutions.

Respondent argues the claimant's injuries are to her forearms which are listed in K.S.A. 44-510d. Respondent further argues that *Casco* is applicable and claimant's compensation is limited to an award for two separate scheduled disabilities pursuant to K.S.A. 44-510d. Consequently, respondent requests the Board to affirm the ALJ's Award.

The sole issue for Board determination is the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Ruthie Hall worked nine years as a deli clerk for the respondent. She had to load and unload chicken into a frier continuously all day long. Claimant was terminated on January 30, 2004, and was paid unemployment benefits for approximately nine months.

At the time of the regular hearing, claimant was working as a deli clerk for a different employer. Claimant testified her hands have not gotten any worse since she has been working for that different employer. She had not had any surgery on her hands and was not wearing any braces nor taking any medication.

After claimant's injury on October 28, 2001, she was placed in an accommodated job working as a cashier for approximately a year and then returned to the deli department. She testified she did not suffer a new injury after being released to return to full-time work. Claimant was terminated from her employment with respondent in January 2004. When the evidence in this case was submitted the claimant was a full-time employee with Wal-Mart.

On March 7, 2006, claimant was examined and evaluated by Dr. C. Reiff Brown at the ALJ's request. Upon physical examination, Dr. Brown found claimant had a sensory

deficit in the median distribution of both hands as well as a notable grip strength loss bilaterally. Dr. Brown opined claimant had bilateral carpal tunnel syndrome that resulted from prolonged work activity while employed with the respondent. The doctor placed the following restrictions on the claimant: (1) permanently avoid work that involves frequent flexion and extension of the wrist greater than 30 degrees; (2) avoid repeated grasp-type activities on a frequent basis; and, (3) avoid frequent use of vibrating hand tools. Dr. Brown recommended claimant see an orthopedic surgeon for a possible surgical intervention. He further opined that if claimant did not have surgery she had reached maximum medical improvement. Based on the *AMA Guides*², Dr. Brown rated claimant's mild bilateral carpal tunnel syndrome to be 10 percent for each upper extremity.

Dr. Pedro Murati examined claimant on September 7, 2004, at the request of claimant's attorney. Dr. Murati performed a physical examination of claimant and diagnosed claimant with bilateral carpal tunnel syndrome. The doctor recommended a repeat EMG/nerve conduction study, physical therapy, splinting and temporary restrictions. On July 7, 2005, claimant was again evaluated by Dr. Murati and diagnosed with bilateral carpal tunnel syndrome. Dr. Murati opined claimant's bilateral carpal tunnel was related to her work for Dillon's. The doctor determined that since claimant had not received any additional treatment she was at maximum medical improvement. Based upon the *AMA Guides*, the doctor concluded claimant had a 10 percent right upper extremity impairment for the carpal tunnel as well as a 6 percent for mild instability of the right wrist. Using the combined values chart, these right upper extremity impairments result in a 15 percent right upper extremity impairment. Claimant's left carpal tunnel syndrome was rated at 10 percent to the left upper extremity. The doctor imposed permanent restrictions that in an 8-hour day the claimant should engage in no heavy grasping with both hands occasionally; no lifting, carrying, pushing, pulling greater than 35 pounds frequently, no use of hooks, knives or vibratory tools with both hands frequently, and limited keyboarding to 20 minutes on and then 40 minutes off.

In *Casco*, the Kansas Supreme Court considered whether an individual who sustained bilateral, parallel, non-simultaneous injuries to his shoulders was entitled to compensation based upon two separate scheduled injuries, under K.S.A. 44-510d, or as a unscheduled whole body injury, under K.S.A. 44-510e(a). After examining the applicable statutes and the relevant case law, the *Casco* Court departed from the well-recognized and long-established case law going back over 75 years. In doing so, it provided certain rules. They are as follows:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.

K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.³

Previously, bilateral injuries were considered as being outside the statutory schedule of impairments set forth in K.S.A. 44-510d and were treated as a permanent partial general impairment.⁴ Now post-Casco, the analysis changes somewhat. Apparently, in any combination scheduled injuries are now the rule, while nonscheduled injuries are the exception.⁵ When an employee's injury involves both arms, as here, there is a rebuttable presumption that the claimant is permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.⁶

Claimant has sustained two separate bilateral upper extremity injuries. Claimant is presumptively permanently and totally disabled. However, that presumption is rebutted by the fact that claimant, at the time of her April 3, 2007, deposition taken after the regular hearing in this case, was engaged in substantial gainful employment working for Wal-Mart. Moreover neither doctor restricted claimant's activities to a degree that substantial gainful employment would be prevented. Consequently, claimant's recovery is limited and she is

³ Casco, 283 Kan. 508, Syl. ¶'s 7-10.

⁴ *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

⁵ *Casco*, 283 Kan. 508, Syl. ¶ 7; *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

⁶ *Id.*, Syl. ¶ 9.

not entitled to permanent total disability benefits under K.S.A. 44-510c(a)(2) but is entitled to compensation for two scheduled injuries.

Here, claimant sustained bilateral, parallel simultaneous injuries to her upper extremities. Both of those extremities are listed in K.S.A. 44-510d. And there is no evidence that as a result of her upper extremity injuries she is permanently and totally disabled. Thus, under the *Casco* analysis, claimant is entitled to recovery based upon *two separate scheduled injuries*.

Claimant argues that wrists are not listed in K.S.A. 44-510d and she is therefore entitled to compensation pursuant to K.S.A. 44-510e. The Board disagrees. That issue was also resolved by the *Casco* decision where it was noted:

Because K.S.A. 44-510d is the general rule and an injury to a wrist (forearm) and an ankle (lower leg) are included on the schedule, the *Pruter* court did not have to consider K.S.A. 44-510e, which only applies to injuries not covered by the schedule. *Pruter*, 271 Kan. at 873, 876; see also K.S.A. 44-510d(a)(18) (defining forearm as the area from the wrist to below the elbow, and lower leg as the area from the ankle to below the knee).⁷

Claimant further argues that the rating to her right forearm should be increased. Both Dr. Murati and Brown rated claimant's bilateral carpal tunnel syndrome at 10 percent. Dr. Murati provided an additional rating to claimant's right wrist for laxity. However, that condition was not found by Dr. Brown nor mentioned in the stipulated medical records of J.E. Harrington, D.O., Ian F. Yeats, M.D. or Malaz Almsaddi, M.D. The ALJ determined that after a careful review of all the evidence, Dr. Brown's opinion was the most persuasive. The Board agrees and affirms.

Finally, the claimant argues K.S.A. 44-510d is unconstitutional as the statute violates both the Equal Protection and Due Process clauses of the State and Federal Constitutions. Claimant wishes to preserve the issue, acknowledging the Board does not have the authority to declare an act of the legislature to be unconstitutional. The Board is not a court of proper jurisdiction to decide the constitutionality of laws in the state of Kansas. A statute is presumed constitutional.⁸ The Board shall apply K.S.A. 44-510d as written and interpreted by courts of competent jurisdiction.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated June 1, 2007, is affirmed.

⁷ *Id.* at 527.

⁸ *Baker v. List and Clark Construction Co.*, 222 Kan. 127, 563 P.2d 431 (1977).

IT IS SO ORDERED.

Dated this _____ day of September 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
 Scott J. Mann, Attorney for Respondent
 Pamela J. Fuller, Administrative Law Judge